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QUESTIONS PRESENTED

1. Whether Petitioner is precluded from maintaining a cause of action for discriminatory termination and retaliation under this Court's holding in *Patterson v. McLean Credit Union* that 42 U.S.C. § 1981 does not encompass conduct after the formation of an employment contract?
2. Was the Court of Appeals correct in applying collateral estoppel to Petitioner's § 1981 claims after a full and fair hearing was held on his Title VII claims, the elements of which are identical to those under § 1981?
3. Does the Seventh Amendment require that Petitioner receive a new jury trial on his § 1981 claims when he failed to establish a *prima facie* case of discrimination during the trial of his Title VII claims?

LIST OF PARTIES

Schwitzer Turbochargers is no longer a subsidiary of, or affiliated with, Household Manufacturing, Inc. The facility in question is now operated as Schwitzer U.S. Inc., a wholly-owned subsidiary of Schwitzer Inc. Schwitzer Inc. is a publicly-traded corporation.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-334

JOHN S. LYITLE,

v.

*Petitioner,*SCHWITZER U.S. INC.,
A SUBSIDIARY OF SCHWITZER INC.,*Respondent.*On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

John S. Lytle filed this action in December, 1984, under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. § 1981). Joint Appendix (J.A.) 4. Lytle claimed he was discharged because of his race, and retaliated against after his discharge because he filed a charge of discrimination with the Equal Employment Opportunity Commission (J.A. 4-14).

A. Summary of the Facts¹

Petitioner was a machinist at Schwitzer's Arden, North Carolina facility for over two and one-half years.

¹ Since Petitioner's discharge claim was dismissed after his evidence, Respondent's full case on this issue is not available in this proceeding. This summary is necessarily limited to claims presented by the Petitioner at trial, to exhibits and to other items of record or points which are not in dispute.

He had the ability to become a satisfactory machinist, but refused to consistently apply himself and meet the employer's standards. As production demands grew at the newly established plant, his productivity limitations and avoidance of overtime assignments became serious liabilities. Petitioner received several disciplinary warnings and performance evaluations critical of his productivity and time wasting.

On August 11, 1983, Petitioner asked to be off work August 12 as a vacation day. The request was granted on the condition that he work Saturday, August 13. Petitioner left work early and unannounced on August 11, and did not report or call in on August 12 or 13. On Monday, August 15, he was discharged for violating Schwitzer's unexcused absence policy. This case squarely presents an employee discharge based upon the insubordinate violation of an essential company policy.

F. Petitioner's Employment Record

John S. Lytle applied for employment with Schwitzer Turbochargers (then, a subsidiary of Household Manufacturing, Inc.) on February 29, 1980. At that time, Schwitzer's new Arden, North Carolina facility had not yet begun production, and was in the initial phases of plant layout and procedures development. Lytle's employment application listed his prior experience as forklift driving, quality control, press operation, mechanics, form grinding, milling, and lathes. While Lytle had previously worked with drills and some metal lathes used at Schwitzer, most of his experience was with equipment Schwitzer did not utilize.² Transcript (Tr.) 84; Plaintiff's Exhibit (PX) 5.

² Lytle's testimony clearly established he was experienced in some facets of basic machining, but had not operated the equipment Schwitzer used in its processes. See Tr. 84 ("Q: Are those machines [on your employment application the same machines] that are used out there at Schwitzer? A: No. Not basically. Drills are, and some of the lathes.") Contrary to Petitioner's brief, there is no evidence that less qualified applicants (white or black) were

Judith Boone, Schwitzer's Human Resources Counselor, asked Lytle to attend a company-paid training class at the local technical college. At the end of this class, lasting approximately two weeks, Lytle would be evaluated for employment. Tr. 83. Most of the applicants in this training class were hired, including Lytle. Tr. 160.

New Schwitzer employees were promoted as they proved their ability to operate more complicated machines. Tr. 89. Lytle admittedly received promotions to more responsible and higher paying machinist positions "right along with" others hired from the same training class. His last position with Schwitzer was the highest paid production job in the plant, Machine Operator IV. Tr. 87, 89. During most of Lytle's employment at Schwitzer, his supervisor was Larry Miller. Tr. 16.

Despite Lytle's initial testimony that there were no complaints about his job performance, Lytle ultimately recalled that Larry Miller cautioned him several times concerning deficient work habits. Tr. 164. For example, on July 27, 1982, Miller issued a written warning to Lytle encouraging him to use his time more efficiently and spend less time away from the machines. Tr. 164, 166-67. Lytle's annual evaluation, issued April 29, 1982, by supervisor Mike McCrary, stated: "John can improve by accepting other assignments as a challenge, not punishment. He also needs to *stay on the job assigned* and not leave it to talk to other employees, or go to break early, etc." Tr. 168-69; PX 6 (emphasis in original). The evaluation also noted on page three that Lytle "loses interest in tasks; enthusiasm fluctuates," and on page four that he "wastes a lot of time" (emphasis in original). The January, 1983 performance evaluation, prepared by Larry Miller, reiterated Lytle's resistance

treated preferentially in the hiring process. At most, Petitioner made an unsupported allegation at trial that he knew of hires who he believed were less qualified. Tr. 82.

to supervision by stating Lytle should accept assignments "as a challenge and not as punishment; this would improve his initiative, relations with others, schedule consciousness and dependability." Tr. 170; PX 7.

On August 3, 1983, Miller again warned Lytle that he was spending too much time away from his machine while it was in operation.³ Tr. 167. Despite this unequivocal warning, Miller was forced to warn Lytle, the very next day, that his production level must increase or his job may be jeopardized. Tr. 166. These selected warnings establish Miller's efforts to focus Lytle's attention on his job and correct his consistently subpar production levels.⁴

C. The Events of August 11-15, 1983

Respondent maintained written policies governing employee absenteeism. PX 22; Tr. 17. The purpose of the absence policy was to recognize, provide for and schedule necessary personal absence, tardies and early departures. PX 22, p. 1. Excessive *excused* absence, tardy, etc., was defined as a total absence level which exceeded four percent of the total available working hours including overtime. Tr. 18. Excessive *unexcused* absence, tardy, etc.,

³ The uncontested evidence, established by Miller's affidavit in defendant's Motion for Summary Judgment, was that Lytle failed to report that his machine was out of order for four hours. Miller urged Lytle to use time more efficiently in order to avoid overtime assignment (Docket Entry No. 13).

⁴ Miller met with Lytle for the specific purpose of discussing this poor production record. For example, Lytle's scheduled production rate in August, 1983, was 513 bearing housings per week. During the first week in August, he produced only 408 parts, or 105 parts short of the goal. On Monday, August 8, Miller informed Lytle overtime would be required that entire week to reduce the bearing housing deficit. An overtime notice was posted repeating this schedule. See defendant's Motion for Summary Judgment (Affidavit of Larry Miller) and Attachment A thereto (Docket Entries 11, 12, and 13).

was defined as *unexcused* absence which exceeds eight hours (or one work shift) in the preceding twelve months. Tr. 17. Either type of excessive absence could lead to termination. Tr. 19. Employees were also instructed to phone the plant when an absence must occur. Tr. 21-22.

On Thursday, August 11, 1983, Supervisor Miller posted a notice in Lytle's department requiring eight hours of overtime on Saturday, August 13, for Lytle and four other machinists, in addition to the overtime which had previously been scheduled for that week. See n. 4, *supra*.⁵ That same day, Lytle asked Miller for a *vacation day* off on Friday, August 12, and Miller agreed. Tr. 130. Later in the day (pursuant to the previously posted overtime schedule), Miller reminded Lytle of his obligation to work Saturday. Tr. 131, Tr. 140-41. Lytle claimed at trial that he explained he was going to the doctor Friday (August 12) and was unfit to work Saturday (August 13). However, according to Lytle's own workplace diary and his own trial testimony, Miller clearly and consistently told Lytle he would have to select and work one of the two days as a condition of receiving any time off.⁶

⁵ Defendant's Motion for Summary Judgment, Affidavit of Larry Miller, Paragraph 9. Lytle had worked only 17 of his 28 scheduled overtime hours in the previous three weeks. *Id.*, Affidavit of Al Duquenne, Paragraph 15 (Docket Entries No. 12 and 13).

⁶ Plaintiff maintained a diary at work in which the August 11, 1983, entry reads: "At 10:30 I asked Larry for a vacation day for Friday, August the 12th. He said okay, but I would have to work Saturday the 13th." Tr. 174. In addition, Lytle testified at trial, regarding the conversation with Miller on the afternoon of Thursday, August 11:

A. It was roughly two o'clock, I was going to get a tool—

A. . . . and I encountered Mr. Miller. He then asked me what was I going to do about Saturday, and I asked him what

Lytle admittedly left work 1.8 hours before completion of his scheduled overtime hours on Thursday, August 11, without telling Miller. Tr. 133, 172-73. He did not call in or report to work Friday, August 12, and did not call in or report to work on Saturday, August 13. Tr. 172-73. Pursuant to company policy, Lytle was terminated on Monday, August 15, 1983, for excessive unexcused absenteeism.

D. Post-Discharge Employment References

Eight days after his discharge, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging race discrimination. PX 1; Tr. 146. He later applied for work with ABF Trucking, Thomas & Howard (Ingles Warehouse), Uniforce Temporary Service, and Perfection Gear. Tr. 147-48, 179-80. Each prospective employer requested and received a reference from Schwitzer. Pursuant to Schwitzer's established reference policy, only Lytle's dates of employment and job title were provided to prospective employers. Tr.

about Saturday. He said, if you're off Friday, you have to work Saturday.

I explained to him then that I wanted Friday off to see the doctor, and I wouldn't be able to work Saturday because I was physically unfit. And at that time he still stated, well, you're going to have to work one of the days. Well, you'll have to work Saturday. And I told him I couldn't, that if I had to I'd give him another vacation day, because I did have that. But I did make kind of a joke that if I gave you a day, which I couldn't work, if I gave you one of my vacation days, well, you're going to pay me time and a half for that vacation day.

At that time, he walked off, and I went to the tool supply room . . . (Tr. 131-32).

Miller stated in his affidavit supporting defendant's Motion for Summary Judgment that Lytle was told to select one of the two days as vacation, or the request would be denied as to both days. Lytle did not give a reason for the vacation request even though Miller asked for a reason (Paragraph 10-12; Docket Entry No. 13).

64, 260-64. Both Uniforce and Perfection Gear hired Lytle. *Id.*

The personnel director at Thomas & Howard testified that Schwitzer's reference included Lytle's employment dates and last job title held. See Tr. 112; Tr. 263. This reference was similar to references that Thomas & Howard had received in the past from other employers. Tr. 115. Schwitzer did not provide any negative information concerning Lytle or his discharge. Tr. 115. Thomas & Howard's decision to reject Lytle's application was not based on information provided or withheld by Schwitzer. Tr. 114-188. The branch manager of ABF Freight Systems (ABF Trucking), Adrienne Finch, testified that Lytle applied for work in late 1983. Tr. 100. Finch forwarded Lytle's application to the Fort Smith, Arkansas headquarters where all hiring decisions are made. Tr. 103-06. Finch had no personal knowledge of the reference provided by Schwitzer to the Fort Smith office. Tr. 105-06. Significantly, Schwitzer's Human Resource Counselor Boone provided ABF Freight with the same neutral reference she had given prospective employers of other terminated employees. Tr. 66, 261-62.⁷

Lytle began working at Perfection Gear as a temporary employee provided by Uniforce Temporary Services in October, 1984. Tr. 280. He became a permanent employee of Perfection Gear in December, 1984. On May 24, 1985, Lytle exceeded the maximum number of permissible absences under Perfection's absenteeism policy. Tr. 284. On that day, Lytle called Perfection Gear and resigned. Tr. 284-85.

⁷ Boone's uncontradicted testimony was that she had a policy and practice of providing the same neutral reference for all discharged employees. As examples, she cited Harold Messenger, Pat Dodge and Arnold Henson. Each of these former employees is white and none had filed charges with the EEOC. Tr. 264-65, 267. Additional examples were available, but the trial judge sustained an objection to further testimony on this issue. Tr. 267.

E. Summary of the Proceedings

Petitioner's action was tried before the court on February 26-27, 1986. The court granted Schwitzer's pre-trial motion to dismiss all claims under 42 U.S.C. § 1981 because no independent factual basis was alleged to support them, leaving Title VII as the exclusive remedy. J.A. 56-57. At the close of Petitioner's evidence, the court granted a Rule 41(b) motion by Respondent as to the discharge claim. The court found by Lytle's own evidence that he violated the unexcused absence policy by 9.8 hours, which was not comparable to a white employee's six minute violation.* Thus, the Court concluded, as a matter of law, that Petitioner had not presented a *prima facie* case to the court. J.A. 58-60. After Respondent's evidence regarding retaliation, the court granted a Rule 41(b) motion and dismissed the action.

The Fourth Circuit Court of Appeals affirmed the district court in an unpublished opinion on October 20, 1987. While the court found that the trial court erred in dismissing Lytle's § 1981 claims prior to trial, the court concluded that remand was unnecessary because the district court's Title VII findings were entitled to collateral estoppel effect and would prevent the relitigation of these findings under a "legal" theory arising out of the same facts. Rehearing was denied April 27, 1987. The petition for a writ of certiorari was filed August 23, 1988, and granted July 3, 1989.

* Petitioner's brief asserts that the trial court found that Lytle had a total of 9.8 hours unexcused absence. *See Pet. Br.* at 11 n. 6 and 33 n. 20. In fact, however, the court found that Lytle's own evidence established that he had 9.8 hours of "excess unexcused absence" (J.A. 59; emphasis added)—i.e., 9.8 hours in excess of the 8 hours allowed under Schwitzer's unexcused absence policy. Even if Petitioner's current version is accepted, Lytle's unexcused absences were plainly different in kind and degree from any other employee on record.

SUMMARY OF ARGUMENT

There are at least three separate and independent grounds for this Court to affirm the judgment of the Fourth Circuit. The most appropriate basis for such an affirmance is the Court's recent decision in *Patterson v. McLean Credit Union*, — U.S. —, 105 L. Ed. 2d 132 (1989), decided after the Fourth Circuit's decision herein. Although the statutory viability of Lytle's § 1981 claims was not addressed by the court of appeals, it is well established that Schwitzer, as the prevailing party below, may defend the lower court's judgment on any basis fairly presented by the record. Moreover, disposition on the basis of *Patterson* is especially appropriate here, because it will permit the Court to avoid unnecessarily deciding the constitutional questions raised by Petitioner.

Turning to the impact of *Patterson*, it is clear that Petitioner's asserted § 1981 claims for discriminatory discharge and retaliation cannot survive this Court's construction of that statute in *Patterson*. The Court held quite emphatically in that case that § 1981 does not provide a general proscription of race discrimination in all aspects of contract relations. Rather, the statute protects only the right "to make" contracts and the right "to enforce" contracts on the same basis as white citizens. These terms must be interpreted in accordance with their plain meaning, with the result that conduct occurring after the formation of a contract is generally not covered by § 1981 unless it involves race-based efforts to impede access to legal process to resolve contract claims.

Neither of Petitioner's claims falls into these categories. His discharge claim obviously involves only post-formation conduct, and it amounts to an allegation of disparate rule enforcement which, according to *Patterson*, falls outside the purview of § 1981. Similarly, his retaliation claim involves only post-formation conduct, is purely a creature of a different statute (Title VII of the Civil

Rights Act of 1964), and does not even involve race-based discrimination (which is the gravamen of § 1981 actions). Thus, on the basis of *Patterson*, this Court should affirm the judgment of the Fourth Circuit or, alternatively, dismiss the writ of certiorari as improvidently granted.

The second basis for affirming the judgment below is the analysis of the Fourth Circuit itself. The court of appeals correctly concluded that the doctrine of collateral estoppel precludes relitigation of the district court's Title VII findings, and hence that Lytle had no viable § 1981 claims inasmuch as the elements of Title VII and § 1981 claims are identical.

This decision is consistent with *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), in which the Court held that judicial factual determinations could constitutionally preclude relitigation of the same facts before a jury pursuant to a legal cause of action. In addition, it is not inconsistent with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), which only establishes a prudential rule whereby courts are directed to permit juries to determine all issues common to both legal and equitable claims where both types of claims are being tried in the same proceeding. That is not the situation here, however, because the trial court's findings were made when there were no pending legal claims which would require jury determination. Thus, this case is more similar to the situation in *Parklane Hosiery*—factual issues on which petitioners had a right to jury trial were tried and determined adversely by the courts under parallel equitable claims which the courts had a constitutional right to decide given the posture of the case.

Finally, the district court's dismissal of the § 1981 claims did not impact the proper resolution of this case. When a plaintiff's evidence is insufficient to defeat a motion for a directed verdict, the Seventh Amendment is not violated by the failure to submit the case to the jury. *Galloway v. United States*, 319 U.S. 372, *rehearing de-*

nied, 320 U.S. 214 (1943). Similarly, when a directed verdict is appropriate, the erroneous denial of a jury trial constitutes harmless error. *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984). Here, the district court dismissed Lytle's Title VII discharge claim at the conclusion of Lytle's evidence, ruling, as a matter of law, that Lytle had not established the elements of a *prima facie* case. The court made a similar ruling regarding the retaliation claim at the conclusion of all the evidence. Thus, Petitioner's evidence would not have withstood a motion for a directed verdict and, as a consequence, any error regarding denial of a jury trial would have to be deemed harmless error.

ARGUMENT

I. THE FOURTH CIRCUIT'S JUDGMENT SHOULD BE AFFIRMED ON THE BASIS OF THIS COURT'S DECISION IN *PATTERSON v. McLEAN CREDIT UNION*

Petitioner contends that the Fourth Circuit's decision improperly deprived him of his Seventh Amendment right to a jury trial on his § 1981 claims for discriminatory discharge and retaliation. However, the Court's recent decision in *Patterson v. McLean Credit Union*, — U.S. —, 105 L. Ed. 2d 132 (1989), makes clear that § 1981 does not provide a cause of action for discriminatory discharge, or for retaliation in response to protected activities. Accordingly, this Court should affirm the Fourth Circuit's judgment on the basis of *Patterson* or, alternatively, dismiss the writ of certiorari as improvidently granted. See *Piccirillo v. New York*, 400 U.S. 548, 548-59 (1971) (writ dismissed as improvidently granted because intervening court decision meant that constitutional question on which Court granted certiorari was no longer necessary to resolution of the case).

Initially, it is well settled that Schwitzer, as the prevailing party below, may defend the appellate court's

judgment on any ground raised in the courts below, whether or not that ground was relied upon, rejected or even considered by the lower courts. *E.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977) ("prevailing party may defend a judgment on any ground which the law and the record permit. . . ."). Indeed, a respondent or appellee before this Court may even defend a judgment on grounds not previously urged in the lower courts,⁹ and this is especially appropriate where, as here, an intervening decision by this Court has changed controlling law. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n. 7 (1984) (permitting a petitioner, who is normally limited to issues presented in the petition for certiorari, to raise issue for first time before this Court because of intervening change in controlling law). Finally, it is particularly appropriate for the Court to consider alternative statutory grounds for affirmance where, as here, the Petitioner has posed a constitutional challenge to the decision below. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985), quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944) (federal courts must consider statutory grounds for judgment before reaching any constitutional questions because "[i]f there is one doctrine more deeply rooted than any other . . . , it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

In short, both this Court's precedents and the posture of this case suggest very strongly that the Court should dispose of the instant case on the *Patterson* issues rather

⁹ *Schweiker v. Hogan*, 457 U.S. 569, 585 & n. 24 (1982), quoting *Blum v. Bacon*, 457 U.S. 132, 137 n. 5 (1982) ("Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm the court's judgment . . . [because it] 'is well accepted that . . . an appellee may rely upon any matter appearing in the record in support of the judgment.'").

than the Seventh Amendment issues raised by Petitioner. Here, Schwitzer has asserted from the outset that Petitioner could not maintain causes of action for termination and retaliation under § 1981 (J.A. 44, 51-56). *Patterson* provides significant new guidance on that question, and it presents purely legal, non-constitutional issues that can be decided on the instant record with no prejudice to the parties. Accordingly, we turn now to a discussion of how *Patterson* impacts this case and requires affirmation of the Fourth Circuit's judgment.¹⁰

The relevant portion of § 1981 under scrutiny in *Patterson* provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981. The *Patterson* Court emphasized that, contrary to the trend in lower court cases, § 1981 "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations." *Patterson*, 105 L. Ed. 2d at 150. Rather, the Court held that the right "to make" contracts "extends only to the formation of a contract," that is, "the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* Thus, the Court refused to ex-

¹⁰ The *Patterson* decision applies retroactively. *See, e.g., Morgan v. Kansas City Area Transportation Authority*, — F. Supp. — (W.D. Mo. 1989) [1989 Westlaw 101802]; *Leong v. Hilton Hotels, Inc.*, — F. Supp. —, 50 FEP Cases 733 (D. Hawaii 1989). The majority of courts faced with this issue have implicitly found that the decision should be applied retroactively. *See, e.g., Overby v. Chevron U.S.A., Inc.*, 884 F.2d 470 (9th Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989). But see *Gillespie v. First Interstate Bank of Wisconsin Southeast*, 717 F. Supp. 649 (E.D. Wisc. 1989). Retroactive application of judicial decisions is the rule, not the exception, *United States v. Givens*, 767 F.2d 574, 578 (9th Cir.), cert. denied, 474 U.S. 953 (1985). In addition, "[t]he usual rule is that federal cases should be decided in accordance with the law at the time of decision." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987)..

tend this aspect of § 1981's coverage to discriminatory conduct occurring after the formation of a contract:

[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment. . . .

105 L. Ed. 2d at 150-51. *See also* 105 L. Ed. 2d at 152, 155. Consistent with this rationale, the Court held that Patterson's claim of pervasive workplace racial harassment involved only post-formation conduct which was not cognizable under § 1981.¹¹

The Court gave a similarly restrictive reading to the second relevant aspect of § 1981. The Court held that the right "to enforce" contracts established in § 1981 "embraces protection of a legal process, and of a right to access to legal process, that will address and resolve contract-law claims without regard to race." 105 L. Ed. 2d at 151. While this protection may extend to private race-based efforts to impede access to contract relief,¹²

¹¹ The Court recognized that § 1981 may cover post-formation conduct in those limited situations where the conduct denies an employee the right to "make" a new employment contract with the employer. For example, a race-based refusal to promote may or may not be actionable under § 1981, depending upon whether the nature of the change in position is such that it would involve entering into a new contract with the employer. 105 L. Ed. 2d at 156. "Only where the promotion rises to the level of an opportunity for a new and distinct relationship between the employee and the employer is such a claim actionable under § 1981." *Id.*

¹² The Court cited the example of a labor union which bears explicit responsibility for prosecuting employee contract grievances and which carries out that responsibility in a racially discrimina-

the right "does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.*

Aside from the fact that these constructions comport with the "plain and common sense meaning" of § 1981's statutory language (105 L. Ed. 2d at 156 n. 6), the *Patterson* Court also recognized that strong policy considerations support such limited constructions. 105 L. Ed. 2d at 152-53. An employee who suffers post-formation discrimination may seek relief under the administrative procedures provided in Title VII. In that statute, Congress established an elaborate administrative procedure designed to assist in the investigation of discrimination claims and to work towards the resolution of these claims through conciliation rather than litigation. *See* 42 U.S.C. § 2000e-5(b). Only after these procedures have been exhausted may a plaintiff bring a Title VII action in court. *See* 42 U.S.C. § 2000e-5(f)(1). Thus, permitting an employee to pursue a parallel claim under § 1981 without resort to the statutory prerequisites would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims," rendering such procedures "a dead letter." *Patterson*, 105 L. Ed. 2d at 153.

Applying the *Patterson* standards to the instant case, it is clear that the Petitioner has no viable claims under § 1981. Petitioner does not contend that Respondent prevented him from entering into or enforcing a contract because of his race. Instead, he contends that Respondent discriminatorily discharged him and then retaliated against him for filing a charge with the EEOC. Petitioner's right under § 1981 to make or enforce a contract on a race-neutral basis is therefore not implicated.

tory manner. 105 L. Ed. 2d at 151, *citing Goodman v. Lukens Steel Co.*, *supra*.

First, a discharge is, by definition, post-formation conduct which does not involve an employee's right to make or enforce a contract. Such conduct, therefore, falls outside the purview of § 1981. See *Leong v. Hilton Hotels Corp.*, *supra*; *Copperidge v. Terminal Freight Handling Co.*, — F. Supp. —, 50 FEP Cases 812 (W.D. Tenn. 1989); *Sofferin v. American Airlines, Inc.*, 717 F. Supp. 587 (N.D. Ill. 1989); *Hall v. County of Cook, State of Illinois*, — F. Supp. — (N.D. Ill. 1989) [1989 Westlaw 99802]; *Greggs v. Hillman Distributing Co.*, — F. Supp. —, 50 FEP Cases 1173 (S.D.N.Y. 1989). But see *Padilla v. United Air Lines*, 716 F. Supp. 485 (D. Colo. 1989).¹³

Second, Petitioner's discharge claim is, at bottom, nothing more than an assertion that he was punished more severely for absenteeism than were similarly situated white employees. See Pet. Br. at 8-12. This is precisely the type of conduct the *Patterson* dissent argued should be covered by § 1981. See 105 L. Ed. 2d at 170 (stating that § 1981 was intended to prohibit "the practice of handing out severe and unequal punishment for perceived transgressions"). However, the *Patterson* majority clearly rejected the dissent's position that such discriminatory rule application is sufficient to state a claim under § 1981. 105 L. Ed. 2d at 155. While recognizing that such post-formation discrimination might be evidence that any divergence in explicit contract terms is due to racial animus, the majority nevertheless emphasized that the "critical . . . question under § 1981 remains whether the employer, *at the time of the formation of the contract*, in fact intentionally refused to

¹³ This district court decision upholding discharge claims under § 1981 demonstrates that the lower courts have not, in fact, had "little difficulty applying the straightforward principles that [the Court announced in *Patterson*]." *Patterson*, 105 L. Ed. 2d at 156 n. 6. This provides an additional reason why the Court should take this opportunity to reiterate the reach of § 1981 and the *Patterson* decision.

enter into a contract with the employee on racially neutral terms." *Id.* (emphasis in original).

Finally, Petitioner does not and cannot contend that his discharge was a race-based effort to obstruct his access to the courts or other dispute resolution processes. Indeed, his discharge had nothing to do with any effort to enforce contract rights or claims.

In short, the Petitioner's discharge claim in the instant case involves post-formation conduct unrelated to his right to make or enforce a contract, and hence it is not cognizable under § 1981.

Petitioner's retaliation claim is even farther afield from § 1981 coverage. First, like Petitioner's discharge claim, the retaliation claim involves only post-formation conduct and therefore is not actionable under § 1981. *Overby v. Chevron U.S.A., Inc.*, *supra*; *Williams v. National Railroad Passenger Corp.*, 716 F. Supp. 49 (D.D.C. 1989); *Dangerfield v. Mission Press*, — F. Supp. —, 50 FEP Cases 1171 (N.D. Ill. 1989).

Second, the prohibition of retaliation against employees for filing discrimination charges is purely a creature of statute, having come into existence only by an express prohibition in Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). Indeed, the prohibition specifically relates only to the exercise of rights conferred by Title VII. Not only did the right to be free from such retaliation not exist before the passage of Title VII, see *Great American Savings & Loan Association v. Novotny*, 442 U.S. 366, 377-78 (1979), but it would be inappropriate to inject rights created by one statute into another statute passed approximately 100 years earlier. See *Warren v. Halstead Industries*, — F. Supp. —, 33 FEP Cases 1416 (M.D.N.C. 1983) (questioning whether a cause of action created by Title VII is actionable under § 1981). See also *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D.

Wisc. 1985) (retaliation for advocacy of equal protection does not support a § 1981 claim).

Moreover, this conclusion is particularly appropriate given the *Patterson* Court's admonition against stretching § 1981 to protect conduct already covered by Title VIII. *Patterson*, 105 L. Ed. 2d at 153. The Court's concern with frustrating Title VII's conciliation goals, discussed above, "is particularly apt where the very conduct complained of centers around one of Title VII's conciliatory procedures: the filing of an EEOC complaint." *Overby v. Chevron U.S.A. Inc.*, 884 F.2d at —, 50 FEP Cases at 1213. Since § 704(a) of Title VII proscribes Respondent's alleged retaliatory conduct, the Court should "decline to twist the interpretation of another statute (§ 1981) to cover the same conduct." 105 L. Ed. 2d at 153.

Finally, and perhaps most importantly, retaliation for filing Title VII charges is not even a race-based issue, which is the *sine qua non* of § 1981 coverage. The anti-retaliation provisions of Title VII are designed to protect channels of information, not freedom from race-based conduct, and they are equally available to employees irrespective of their race, sex, national origin, etc. See *Eichman v. Indiana State University Board of Trustees*, 597 F.2d 1104, 1107 (7th Cir. 1979) (§ 704 of Title VII "extends protection to all who 'assist' or 'participate' regardless of their race or sex"). Thus, put quite simply, a claim of retaliation for filing Title VII charges has nothing to do with an employee's § 1981 right to make and enforce contracts on the same basis as white citizens. Indeed, even before this Court's *Patterson* decision, many lower courts had held that discrimination based on factors other than race, such as retaliation in violation of § 704(a) of Title VII, does not violate § 1981. See, e.g., *Hudson v. IBM*, — F. Supp. —, 22 FEP Cases 947 (S.D.N.Y. 1975); *Takeall v. WERD, Inc.*, — F. Supp. —, 23 FEP Cases 947 (M.D. Fla. 1979);

Grant v. Bethlehem Steel Corp., — F. Supp. —, 22 FEP Cases 680 (S.D.N.Y. 1978); *Barfield v. A.R.C. Security, Inc.*, — F. Supp. —, 10 FEP Cases 789 (N.D. Ga. 1975).¹⁴ The correctness of that conclusion has only been confirmed by *Patterson's* mandate that § 1981 be interpreted in accordance with the plain and common sense meaning of its terms and that courts should avoid "twist[ing] the interpretation of [§ 1981] to cover the same conduct" covered by Title VII. 105 L. Ed. 2d at 153.

In sum, while both of Petitioner's claims are cognizable under Title VII, and indeed have been given full consideration under that statute, neither is cognizable under § 1981. Accordingly, this Court should either affirm the Fourth Circuit's judgment on the basis of *Patterson* or dismiss the writ of certiorari as improvidently granted.

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE RETRIAL OF ISSUES ALREADY DECIDED BY THE DISTRICT COURT

The preceding section demonstrates that the fundamental predicate of Petitioner's Seventh Amendment argument no longer exists. Specifically, the collateral estoppel and jury trial issues arose in the Fourth Circuit only because the court assumed that the district court had erroneously dismissed Petitioner's § 1981 claims. If dismissal was proper—and the foregoing section shows it was—then no new trial is necessary and, *a fortiori*, the question of whether collateral estoppel is applicable does not arise. As a consequence, the Court need not reach the collateral estoppel/Seventh Amend-

¹⁴ Although there are cases to the contrary (e.g., *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982)), they are not in keeping with the statutory intent of § 1981 to prohibit employment decisions based on race, rather than post-discharge actions allegedly based on participation in statutory proceedings under Title VII.

ment issue in order to affirm the judgment of the court of appeals. Nevertheless, we show below that the Fourth Circuit's application of collateral estoppel to Petitioner's § 1981 claims is consistent with this Court's decisions.

If the Court addresses the collateral estoppel issue, it should uphold the decision of the court of appeals. The Fourth Circuit held that the doctrine of collateral estoppel precluded relitigation of the facts already decided by the district court and, as a consequence, that Lytle had no viable § 1981 claim since the elements of Title VII and § 1981 are identical. This decision is consistent with the purpose of collateral estoppel, which is to protect litigants from the burden of relitigating an identical issue with the same party or his privy and to promote judicial economy by preventing needless litigation. *See University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986); *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971).

Contrary to Petitioner's contention, the Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), does not require a different result. *Beacon Theatres* holds that when legal and equitable claims are joined in one proceeding, the legal claims should be tried first before a jury if possible. Although derived from the Seventh Amendment, this doctrine is nothing more than a "general prudential rule" for courts to follow. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979).¹⁶ Like most other rules of constitutional origin, the *Beacon Theatres* doctrine cannot be woodenly applied

¹⁶ In *Katchen v. Landy*, 382 U.S. 323 (1966), the Court stated that the *Beacon Theatres* rule is an equitable doctrine which is inapplicable when Congress develops a statutory scheme contemplating the prompt trial of disputed claims without the intervention of a jury.

and must yield when outweighed by other important principles.¹⁷

Moreover, in *Parklane Hosiery*, this Court itself addressed the conflict between the *Beacon Theatres* rule and the principle of judicial economy underlying the doctrine of collateral estoppel, and its decision fully supports the Fourth Circuit's analysis. In that case, the Court rejected the argument that the Seventh Amendment prohibits application of collateral estoppel to preclude a jury trial of facts previously decided by an equity court and found that the Seventh Amendment does not establish such a rigid barrier to the efficient operation of our legal system. Instead, the Court adopted a more pragmatic view of the Seventh Amendment, one which guarantees the plaintiff a full and fair opportunity to litigate his claims, but prohibits needless relitigation of facts already decided. Using this realistic approach, the Court concluded that any harm caused by the denial of a jury trial was clearly outweighed by the judicial interest in the economical resolution of cases. Thus, the Court held that application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been decided." *Id.* at 336.

This is precisely the rationale the Fourth Circuit applied in the instant case. In doing so, the court followed its earlier decision in *Ritter v. Mount Saint Mary's College*, 814 F.2d 986 (4th Cir.), cert. denied, 484 U.S. 913 (1987), in which the district court had dismissed the plaintiff's claims under the Age Discrimination and Equal Pay Acts,¹⁷ and tried the Title VII claims without a jury.

¹⁷ *Katchen v. Landy*, 382 U.S. at 339-40. *Cf. Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (First Amendment rights subject to reasonable restrictions).

¹⁷ 29 U.S.C. § 621 *et seq.*, and 29 U.S.C. § 206(d), respectively. Unlike Title VII, both of these statutes provide for trial by jury.

After determining that the legal and equitable claims shared common elements, the *Ritter* court held that the factual determinations made by the district judge in dismissing the Title VII suit collaterally estopped relitigation of the same issues on the legal claims. The court found this situation squarely within this Court's holding in *Parklane Hosiery*:

This court need not involve itself in the laborious and inconclusive policy analysis suggested by the parties on this issue, however, because the Supreme Court has already undertaken this policy analysis for us. *Parklane* decided that the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in re-trying before a jury the facts of a case determined by a court sitting in equity.

Ritter, 814 F.2d at 991.

The Fourth Circuit's decision in this case promotes the same policy considerations enunciated in *Parklane* and *Ritter*. Petitioner received a full and fair opportunity to try his Title VII claims before the district judge and his efforts fell short. Schwitzer was awarded an involuntary dismissal on the termination claim after the presentation of Lytle's evidence and Petitioner's retaliation claim was involuntarily dismissed at the end of all the evidence (J.A. 60, 64). In these circumstances, Lytle's request for a new trial before a jury is outweighed by the interests furthered by collateral estoppel.

Nor has Petitioner cited any persuasive argument or authority requiring a contrary result. First, Petitioner is plainly wrong in suggesting that collateral estoppel may not be applied to prevent relitigation of issues in the same suit. Indeed, the *Parklane Hosiery* decision specifically recognized that the major premise underlying the *Beacon Theatres* rule is that, unless legal claims are determined prior to equitable claims, a judge's factual find-

ings on the equitable claims would collaterally estop the jury's redetermination of those issues. *Parklane Hosiery*, 439 U.S. at 334.¹⁸

Second, Petitioner begs the question by arguing that "[t]his Court has *never* excused the Seventh Amendment violation by holding that the judge's intervening factual findings pretermit presentation of a litigant's case to a jury." Pet. Br. at 35 (emphasis in original). It is true that, once a Seventh Amendment violation is found, the proper course is to re-try the case before the jury. However, that does not answer the question of whether the Seventh Amendment is violated by giving collateral estoppel effect to a judge's findings on equitable claims that are properly determinable by the court in the absence of then-pending legal claims raising the same issues.

Nor do the cases cited by Petitioner answer this latter question. See Pet. Br. at 35-40. Most of those cases involved straightforward situations in which the district court had simply made an erroneous determination that the claims or issues in dispute should be tried to the court rather than to a jury. E.g., *Granfinanciera v. Nordberg*, — U.S. —, 106 L. Ed. 2d 26 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932).¹⁹ In such situations, the judge's determination

¹⁸ In addition, as noted by the court in *Ritter*, the prior suit notion merely reflects the manner in which the application of collateral estoppel typically arises. *Ritter*, 814 F.2d at 991-92. If collateral estoppel can be used to bind persons to judgments in which they were not parties, it would be illogical to refuse to apply the principle to the same parties that litigated the issues before the district court.

¹⁹ For example, in the *Granfinanciera* case, the only claim presented involved an alleged fraudulent transfer. The court denied defendant's jury trial request and entered judgment for plaintiff. This Court reversed and directed a jury trial on the fraudulent

of the claims is the essence of the Seventh Amendment error, and is properly subject to being vacated on appeal.

Here, by contrast, the trial court's alleged error did not involve a direct violation of the Seventh Amendment, as would have occurred if the district had simply determined that § 1981 claims are triable to the court. Instead, the court's alleged error was the dismissal of the § 1981 claims, since it is undisputed that courts, rather than juries, appropriately determine Title VII claims. *See Great American Savings & Loan v. Novotny*, 442 U.S. 366, 375 (1979).

The instant case, then, is distinguishable from the cases cited by Petitioner in a critical respect: here, the court's findings were made at a time when there were no pending legal claims which would require jury determination.²⁰ And in this respect, the instant case is identical to the situation in *Parklane Hosiery*—factual issues on which petitioners had a right to a jury trial were tried and determined adversely by the courts under parallel equitable claims which the courts had a right to decide given the posture of the case.

transfer claim. Similarly, in *Tull* the Court held that the Seventh Amendment guarantees a jury trial for determination of liability under the Clean Water Act, 33 U.S.C. § 1319(b), (d). The only portion of that case not requiring jury resolution was the amount of the civil penalty. Of course, the size of the penalty can only be determined after jury resolution of liability issues. Thus, there was no claim pertaining to liability properly tried by the court.

²⁰ This fact also serves to distinguish *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), upon which Petitioner places heavy reliance. *See Pet. Br.* at 39-40. As described by Petitioner, *Meeker* involved nothing more than a straightforward application of the *Beacon Theatres* rule—i.e., the trial court had pending before it both legal and equitable claims with common factual issues, and it violated the *Beacon Theatres* rule by choosing to decide the equitable claims first, thereby foreclosing jury determination of the legal issues.

Equally important, moreover, the interests of judicial economy advocated in *Parklane Hosiery* apply whether or not the dismissal of the legal claims was in error. Under the teachings of *Parklane*, the critical issue is not whether the trial court's denial of the jury trial was correct, but whether harm resulted from the denial. *Ritter*, 814 F.2d at 991. As long as the district judge's factual findings were not erroneous, Lytle was not prejudiced and the judicial interests underlying the doctrine of collateral estoppel outweigh any nominal injury. Otherwise, the parties must conduct a full trial to the bench with the risk that it may be for naught if any of the legal claims are reversed and remanded to be tried by a jury, at a cost of substantial time and resources to the court and to the litigants. *Id.* The parties' motivation in litigating such a provisional trial would be questionable. Fortunately, in *Parklane Hosiery* this Court balanced the interests involved and found that the scale tipped in favor of applying collateral estoppel. Where, as here, Petitioner has been provided a full and fair opportunity to litigate his claims, “one trial of common facts is enough.” *Ritter*, 814 F.2d at 991.²¹

Finally, contrary to Petitioner's assertion, the Fourth Circuit's decisions in *Lytle* and *Ritter* will not eliminate the *Beacon Theatres* rule. The *Lytle* and *Ritter* reasoning applies only where the court tries a parallel equitable claim and there are no legal claims pending. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 464-65 (4th Cir. 1989) (Phillips dissenting); *Dwyer v. Smith*, 867

²¹ Petitioner's contention that the right to jury trial is particularly important in § 1981 cases is contrary to *Independent Federation of Flight Attendants v. Zipes*, — U.S. —, 105 L. Ed. 2d 639 (1989), where the Court held that Congress did not intend for Title VII to override other procedural and judicial interests. Collateral estoppel is equally applicable to civil rights claims as it is to other matters. *University of Tennessee v. Elliot*, 478 U.S. 788, 796-97 (1986) (“Congress, in enacting civil rights statutes, did not intend to create an exception to general rules of preclusion”).

F.2d 184, 192 n. 4 (4th Cir. 1989). Thus, the vast majority of cases will continue to be decided in accordance with the prudential rule of *Beacon Theatres*, in which pending legal claims are decided first whenever they are joined in the same action with equitable claims.²² Indeed, the Fourth Circuit has shown that it will conscientiously follow this principle. *See e.g., Grossos Music v. Mitken, Inc.*, 753 F.2d 117 (4th Cir. 1981) (court relies on *Beacon Theatres* and *Dairy Queen* in reversing denial of jury trial); *Tights Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971) (Fourth Circuit issues writ of mandamus directing district court to vacate order striking jury trial demands). In the rare instance where the equitable issues are tried first, *Parklane Hosiery* teaches that the Seventh Amendment does not compel the expensive, time-consuming relitigation of factual issues already decided. The Fourth Circuit's application of this rule in the *Lytle-Ritter* context comports with this philosophy and should be affirmed.²³

In sum, the Fourth Circuit in this case correctly followed *Parklane* in holding that the district court's findings in the Title VII claim precluded relitigation of these issues. The court's reasoning will prevent needless relitigation of judges' sound findings and furthers the interest of judicial economy. Accordingly, the decision below should be affirmed.

²² Petitioner's assertion that federal trial judges will be induced by the Fourth Circuit's decision to try the equitable claims before the jury claims in a joint suit merely for their own convenience is unfounded. The allegation that federal judges would willingly disregard this Court's decisions, along with Petitioner's repeated implications that judges' factual determinations are inherently suspect, is an unwarranted censure of the federal judiciary.

²³ Due to the infrequent applicability of the *Lytle-Ritter* principle, Petitioner's claim that it will result in increased litigation is without merit.

III. DISMISSAL OF THE § 1981 CLAIMS HAD NO EFFECT ON THE OUTCOME OF THIS CASE

Even if the court of appeals erred in holding that relitigation of Petitioner's § 1981 claims was precluded by collateral estoppel, such error was harmless under Fed. R. Civ. P. 61 and does not warrant a new trial.²⁴ This Court has long recognized that when a plaintiff's evidence is insufficient as a matter of law to establish a *prima facie* case, the Seventh Amendment is not violated by the issuance of a directed verdict. *See Galloway v. United States*, 319 U.S. 372, *rehearing denied*, 320 U.S. 214 (1943). In *Galloway*, this Court pointed out that the Seventh Amendment guarantees both a plaintiff's right to have legitimate claims heard by a jury and a defendant's right to attack the legal sufficiency of plaintiff's evidence without protracted litigation. *Id.* at 392-93. The Court rejected the contention that the Seventh Amendment requires a new trial where, as here, plaintiff cannot establish a critical element of his claim. *Id.* at 394.

Other courts of appeal addressing this issue agree with the First Circuit that "there is no constitutional right to have twelve men sit idle and functionless in a jury box." *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982). For example, in *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984), the Third Circuit affirmed the district court's dismissal of plaintiff's § 1981 claims alleging politically motivated discharges. The court held that the dismissal of these claims, and the affiliated right to a jury trial, constituted harmless error since the evidence adduced at trial was

²⁴ This point was argued by Respondent before the court of appeals, but the court did not reach this issue. However, it is well established that a Respondent can seek affirmance on any ground disclosed by the record. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

insufficient to avoid a directed verdict if a jury had been impaneled.²⁵

Indeed, the cases relied upon by Petitioner are not inconsistent with these principles. For example, in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), the court stated that before addressing the collateral estoppel issue, there must be an inquiry into whether the denial of a jury trial constitutes harmless error. *Hussein*, 816 F.2d at 354 n. 6.²⁶

²⁵ Accord *Bowles v. United States Army Corps of Engineers*, 841 F.2d 112 (5th Cir.), cert. denied, 109 S. Ct. 33 (1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); *In re Professional Air Traffic Controllers Organization of America*, 724 F.2d 205 (D.C. Cir. 1984); *Atwood v. Pacific Maritime Association*, 657 F.2d 1055 (9th Cir. 1981); *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728 (10th Cir.), cert. denied, 389 U.S. 857 (1967).

²⁶ Moreover, Lytle misses the mark in attempting to avoid the harmless error principle by relying on cases involving issues such as an improper forum and the failure of a judge to recuse himself. The interests at issue in these cases differ drastically from the issue of whether the denial of a jury trial was harmless. In the forum selection context, the right infringed is the right not to be tried at all outside a particular forum. See *Lauro Lines S.R.L. v. Chasser*, ___ U.S. ___, 104 L. Ed. 2d 548 (1989) (Scalia, J., concurring). The correctness or error of the factual findings in the improper forum is irrelevant to this inquiry. Similarly, the failure of a judge to recuse himself infects the entire judicial process. Even the appearance of partiality requires recusal, regardless of actual harm. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). By contrast, the denial of a jury trial can only be harmful if the jury would have been given the opportunity to decide the case. *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987).

Other cases cited by Lytle for this proposition are similarly unpersuasive. For example, in *Gomez v. United States*, 104 L. Ed. 2d 923 (1989), the Court noted that harmless error analysis is not applicable to a felony case. However, in *Rose v. Clark*, 478 U.S. 570 (1986), another criminal case cited by Lytle, the Court pointed out

In short, it is clear that this Court need not address the collateral estoppel issue if a directed verdict would have been proper under Rule 50(a) of the Federal Rules of Civil Procedure. Such a directed verdict is appropriate when there is a complete absence of proof on an issue material to the cause of action or when there are no controverted issues of fact upon which reasonable jurors could differ. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); 5A Moore's Federal Practice at Paragraph 50.02.

The evidence presented by Petitioner in this case, even when viewed in the most favorable light, is insufficient to defeat a directed verdict.²⁷ As the Fourth Circuit correctly noted, "it is established beyond peradventure that the elements of a *prima facie* case of employment discrimination alleging disparate treatment under Title VII and § 1981 are identical." Pet. App. 13a-14a. Facts that preclude relief under Title VII also preclude a § 1981 claim. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir., 1980), cert. denied, 449 U.S. 1113 (1981).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. The Fourth Circuit has refined the elements applicable to suits, like this one, which allege discriminatory disciplinary action. *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), cert. denied, 472 U.S. 1021 (1985). *Moore* held that to establish a *prima facie* case of racial

the strong presumption of application of harmless error analysis, even in the criminal context. The Court found the error, an improper jury instruction, was harmless.

²⁷ Contrary to Petitioner's assertion, the district court's denial of Schwitzer's motion for summary judgment does not indicate that Petitioner's claims would have been submitted to the jury at trial. It is well established that the denial of a motion for summary judgment does not preclude a directed verdict at trial. *Gross v. Southern Ry. Co.*, 446 F.2d 1057, 1060-61 (5th Cir. 1971); *Armco Steel Corp. v. Realty Investment Co.*, 273 F.2d 483, 485 (8th Cir. 1960).

discrimination in a case involving a discharge for violation of company rules or policies, the plaintiff must show: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person. *Moore*, 754 F.2d at 1106.

Application of these factors reveals, as the district court found, that Lytle failed to establish a *prima facie* case. Schwitzer's absentee policy distinguishes between excused and unexcused absences, with a stricter standard for the latter based on the greater disruptive effect of unexcused absence on the company's operation. Excused absences must also be agreed to in advance by the employee's supervisor (Tr. 17-19). Lytle's testimony indicated that he asked for a vacation day on Friday, August 12, 1983. When his supervisor, Larry Miller, told him that he would still have to work Saturday, August 13, Lytle replied that he would be unable to work because he was "physically unfit." According to Lytle, Miller denied the request and told him he would have to work one of the two days. Lytle responded that he would use two vacation days if required, but expected time and one-half pay for the Saturday vacation day (Tr. 131-32). He admits that Miller walked off without granting his request. It is undisputed that Lytle left 1.8 hours early that day and did not report or call in on August 12 or 13 (Tr. 133, 172-73).

Lytle presented no evidence that Miller granted the day off or excused him from reporting to work or calling in.²⁸ Lytle's subjective understanding of Miller's actions is insignificant, since proof of discriminatory intent is required to establish liability under § 1981, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982),

²⁸ In addition, there is no evidence that Miller discriminatorily denied the requested time off.

and under Title VII's disparate treatment theory. *McDaniel v. Temple Independent School District*, 770 F.2d 1370 (5th Cir. 1985) (the issue is not whether the employer made the correct decision, but whether it intended to discriminate against the employee); *Verdell v. Wilson*, 602 F. Supp. 1427, 1434 n. 4 (E.D.N.Y. 1985) (discrimination cannot be founded on a difference of opinion).

Moreover, Lytle was unable to sustain his burden under *Moore* by identifying a single non-black employee guilty of a similar violation who was not discharged (J.A. 60). This requirement was not met by evidence of white employees with excessive *excused* absences and a white employee with six minutes of excessive unexcused absence. Schwitzer's policies clearly distinguish between excused and unexcused absences, and a six-minute violation (consisting of tardiness, not refusal to work) differs markedly from Lytle's 9.8-hour violation. Lytle's inability to identify an individual guilty of a similar offense who was treated preferentially precludes him from establishing a vital element of a *prima facie* case.

Significantly, after hearing only Lytle's evidence, the district court granted Schwitzer's motion for involuntary dismissal under Fed. R. Civ. P. 41(b) on the discriminatory discharge claim, finding, as a matter of law, that Lytle had failed to establish a *prima facie* case. In making this determination, the court recognized the difference between excused and unexcused absences under Schwitzer's attendance policy (J.A. 59), and also recognized that the *excused* absence of white employees were not as serious as Lytle's *unexcused* absences. Not only are the standards and purposes different, but the court would have had to ignore common sense and basic principles of judicial notice to come to any other conclusion. As a result, the court concluded as a matter of law that Lytle had not established a *prima facie* case of race

discrimination.²⁹ Although the standards vary under Rules 41(b) and 50(a), the court's decision did not rest on credibility determinations. Rather, Petitioner's inability to establish a critical element of a *prima facie* case would have guaranteed a directed verdict as a matter of law even if a jury had been impaneled. Since Schwitzer would have received a directed verdict, the denial of a jury was harmless error and remand of the case is unnecessary.

Similarly, a directed verdict would have been proper on Lytle's § 1981 retaliation claim.³⁰ In order to establish a *prima facie* case of retaliation, plaintiff must prove the following three elements by a preponderance of the evidence: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection between the

²⁹ At the close of Petitioner's case, the district court made the following specific determinations:

I will find by plaintiff's own evidence plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;

I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

Based on these findings, the court concluded:

I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was discharged for violation of the company's policy, but I will conclude as a matter of law that he has not established a *prima facie* case, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;

And I will order that the claim as to the discharge be dismissed. (J.A. 59-60) (emphasis added).

³⁰ Just as with the discriminatory discharge claim, the elements for retaliation under § 1981, if allowed, are the same as those under Title VII. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984).

protected activity and the adverse action. Because Petitioner could only establish the first of the three mandatory elements, his retaliation claim was properly dismissed. *Canino v. EEOC*, 707 F.2d 468 (11th Cir. 1983) (dismissal proper when plaintiff satisfied only two elements of a *prima facie* case).

Petitioner alleged that Schwitzer treated him adversely following the filing of his EEOC charge by providing a neutral letter of reference to prospective employers which contained only his dates of employment and former job title. However, Schwitzer has ~~a~~ well-established company policy of providing such limited references. Indeed, Schwitzer presented evidence of several other instances when employees who had not filed EEOC charges received the same limited reference as that provided for Lytle (Tr. 264-65, 267). Although it appears that in one case a more detailed reference was supplied, this incident was a single, unintentional aberration to an otherwise uniform company policy, and there was no contrary evidence (J.A. 62-63). As a consequence, at the end of all the evidence the district court held that Lytle's retaliation claim was without foundation as a matter of law and entered judgment for Respondent under Rule 41(b) (J.A. 64). In these circumstances, even if § 1981 applies to retaliation claims, and even if attempts to prove retaliation would not be collaterally estopped, Petitioner's failure to establish a *prima facie* case would have warranted a directed verdict. Accordingly, the denial of a jury trial was harmless error under Fed. R. Civ. P. 61 and a new trial is unnecessary.³¹

³¹ In the event the Court does not affirm the decision of the court of appeals on any of the grounds discussed above, the proper remedy would be a remand for consideration of the § 1981 issue and a motion under Rule 50(a) for a directed verdict. See *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 271 (1977); 7 Moore's Federal Practice, Paragraph 61.06.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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